No. 29694 - James D. Kizer and Joyce Kizer v. Charles Harper

FILED
November 30, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, J., dissenting:

In this case the majority opinion upholds a jury verdict of $1,299,000.01 against a homeowner, Mr. Harper, for the alleged negligent work of an electrician that caused injury to the plaintiff, Mr. Kizer.[1] With this decision, the majority opinion has expressly and implicitly ruled that West Virginia homeowners are strictly liable for work performed by independent contractors involving dangerous activities that causes injuries to third persons. I do not believe that the majority opinion prudently addressed and resolved the issues in this case. For the reasons set forth below, I dissent.

A. Mr. Harper Was Entitled to Judgment as a Matter of Law

The majority opinion concluded that Mr. Harper was not entitled to post-trial judgment as a matter of law. I disagree for two reasons. First, the analysis used by the majority opinion is flawed and does not support its conclusion. Second, the evidence submitted at trial necessitated granting to Mr. Harper judgment as a matter of law.

1. Flawed analysis. The majority opinion agreed with Mr. Harper's "contention that proof of a statutory violation, in this case a licensing violation . . ., is not sufficient to establish negligent

[1]I have characterized Mr. Harper as the homeowner even though the electrical work was actually performed on his mother's home.

hiring." However, after conceding this fact, the majority opinion states that two reasons prevent Mr. Harper from prevailing. As to the first reason, the majority opinion concludes that proof of a statutory licensing violation permits the negligent hiring issue to go to the jury, and thus, a jury question was presented as to whether the statutory violation was the proximate cause of the plaintiff's injuries.

The first reason tendered by the majority opinion says nothing. Mr. Harper's argument does not question the propriety of sending the issue to the jury. Instead, Mr. Harper attacked the jury verdict, based upon the evidence presented. Accordingly, an analysis of Mr. Harper's argument in the context of whether a jury issue was presented is unsound. Such an analysis would be applicable only if Mr. Harper had alleged that the trial judge should have granted a pre-verdict motion for judgment as a matter of law.

The second ground used by the majority opinion to deny Mr. Harper relief is equally disingenuous. The majority contends that special interrogatories should have been submitted to the jury "to connect the acts of negligence upon which they sued to the statutory violation to prove negligent hiring[.]" According to the majority, because such interrogatories were not submitted, it was unable to conclude "that the jury did not determine, as part of their finding of negligence, that the statutory violation was the proximate cause of the injuries[.]"

In the context used by the majority opinion, the issue of special interrogatories is irrelevant as to whether there was sufficient proof to find negligent hiring. The issue presented by Mr. Harper

required this Court to review the evidence.

As previously indicated, the majority opinion concedes that proof of a statutory violation was insufficient to establish negligent hiring. In the face of this concession, the majority nevertheless opines that the jury could have determined that the statutory violation was the proximate cause of the injury in this case. I cannot understand such reasoning. How is it possible that a statutory violation is *insufficient*, standing alone, to establish negligent hiring; yet a statutory violation is *sufficient*, standing alone, to be the proximate cause of the injury for which Mr. Harper was held liable? In other words, until negligent hiring was established, the issue of proximate cause could not be resolved.

2. The evidence submitted at trial on the issue of negligent hiring. I have attempted to show that the majority opinion's rationale for affirming the trial court's denial of Mr. Harper's post-trial motion for judgment as a matter of law was tortured. The majority reached its result primarily by refusing to examine the evidence.

For example, at trial, the plaintiff presented evidence to show that the electrician, Mr. Vance, did not have a statutorily required electrician's license. This was the only evidence submitted as proof of negligent hiring by Mr. Harper. Conveniently omitted from the majority opinion was Mr. Harper's evidence to show that he acted reasonably in hiring Mr. Vance. The record indicates that Mr. Harper's daughter referred Mr. Vance to him. Mr. Vance had worked as an electrician for the same employer as Mr. Harper's daughter. Also, there was evidence that Mr. Vance had twenty-three years of experience

as an electrician. Finally, there was evidence that Mr. Harper had asked Mr. Vance if he was licensed. Mr. Vance indicated he had a proper license.[2] Based upon this evidence, the trial court should have granted Mr. Harper's post-trial motion for judgment as a matter of law.

Prior to this case, we have never required homeowners to do more than make a reasonable inquiry into licensure of professional independent contractors like Mr. Vance. Under the flawed reasoning of the majority opinion, homeowners must now go beyond merely asking an independent contractor if he or she is properly licensed to perform the work required.

B. The Majority Opinion Makes All Homeowners Strictly Liable for Negligent Work by Electricians That Cause Injury

Mr. Harper contended that the trial court committed error by giving a jury instruction that makes a principal liable for the negligence of an independent contractor in performing inherently dangerous activity. *See* Syl. pt. 2, *King v. Lens Creek Ltd. Partnership*, 199 W. Va. 136, 483 S.E.2d 265 (1996) ("A principal has a non-delegable duty to exercise reasonable care when performing an inherently dangerous activity; a duty that the principal cannot discharge by hiring an independent contractor to undertake the activity."). The majority opinion mischaracterizes Mr. Harper's argument by indicating that he based the argument on the grounds that the instruction incorrectly informed the jury "that breaker box installation is an inherently dangerous activity." A careful reading of Mr. Harper's brief shows that he did

[2]Near the conclusion of the majority opinion it obliquely suggests that Mr. Harper failed to make any inquiry into whether Mr. Vance was licensed. However, the record shows that Mr. Vance "told Harper he was 'a licensed electrician, a certified electrician.'"

not make such an argument. His brief actually complained that the instruction "misstated the law by instructing the jury that Vance's alleged negligence could be 'chargeable' to Harper."

While the majority opinion asserted that it was not deciding whether electricity is an inherently dangerous activity in non-commercial settings, this determination was indeed made by the majority. Because the majority opinion approved of the trial court giving an instruction on the dangerous activity exception to the independent contractor rule, it is axiomatic that the majority opinion has concluded that electricity is an inherently dangerous activity in non-commercial settings.[3] Thus, the majority has opened the door to imputing liability for the negligent acts of independent contractors, performing inherently dangerous work, to non-negligent and unsuspecting homeowners.

Until this decision, this Court has never applied to a homeowner[4] the dangerous activity exception to the independent contractor rule. Clearly under the law as it heretofore existed in this State, Mr. Harper correctly argued that the instruction on the dangerous activity exception to the independent contractor rule should not have been given. This rule was intended for application to commercial enterprises, i.e., contractors and subcontractors, not to homeowners who hire independent contractors to

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[3]The dangerous activity exception to the independent contractor rule may only be invoked for work considered inherently dangerous.

[4]In a footnote, the majority opinion stated that, because no special interrogatory was given on the issue of negligent hiring and the dangerous activity exception to the independent contractor rule, the Court was unable to determine upon which theory of liability the jury has based its decision. However, as I have illustrated, the plaintiff presented no evidence sufficient to establish negligent hiring for liability purposes. Therefore, it is quite obvious that liability could only be found under the erroneously given instruction on the dangerous activity exception to the independent contractor rule.

do work on their homes. We have noted that "[t]he dangerous work exception to the independent contractor defense is that if the employer of the independent contractor knows the work is hazardous or dangerous, he cannot escape liability." *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 303 n.18, 418 S.E.2d 738, 749 n.18 (1992). Furthermore,

> [t]he exception is grounded in a recognition that the possibility of harm to others is so great when the work activity is inherently dangerous that the law tolerates it only on terms of insuring the public against injury. We impose vicarious liability under these circumstances to insure that the public has legal access to a financially responsible party.

Shaffer v. Acme Limestone Co., 206 W. Va. 333, 343, 524 S.E.2d 688, 698 (1999) (quoting *D.B. Griffin Warehouse, Inc. v. Sanders*, 336 Ark. 456, 465, 986 S.W.2d 836, 840-41 (1999)). *See also Peneschi v. National Steel Corp*., 170 W. Va. 511, 521, 295 S.E.2d 1, 12 (1982) ("the employer of an independent contractor cannot insulate himself from liability to third parties for the consequences of the use of abnormally dangerous instrumentalities by employing an independent contractor.").

The ultimate effect of the majority decision is to subject all West Virginia homeowners to strict liability for work on their home that involves dangerous activity and causes injury to a third person. *See Justus v. Swope*, 457 N.W.2d 103, 104 (Mich. Ct. App. 1990) ("The inherently dangerous activity doctrine is something akin to strict liability."). Under the majority decision, it becomes irrelevant whether the independent contractor hired by a homeowner is properly licensed. Simply put, I do not believe that our law should make homeowners strictly liable for work negligently performed by independent contractors.

The position that I am taking was also taken by the Michigan Court of Appeals in *Justus v. Swope*. The decision in *Justus* involved a law suit brought against a homeowner by an employee of an independent contractor. The employee was injured while removing a tree from the homeowner's yard. The trial court granted summary judgment to the homeowner. On appeal, the employee argued that the dangerous activity exception to the independent contractor rule applied. Therefore, summary judgment was inappropriate. The appellate court disagreed. The court indicated that for public policy reasons, the dangerous activity exception to the independent contractor rule could not be imposed upon a homeowner. The appellate court reasoned as follows:

> It is not reasonable, nor in the public interest, to expect a mere homeowner to be cognizant of, or liable for, the "special dangers" or "peculiar risks" to employees of an independent contractor where he has no knowledge of the normal procedures involved in the activity, he has no knowledge of, or capability to provide, proper safety precautions, and where the independent contractor and his employees are more knowledgeable than the homeowner about the activity, risks and necessary safety precautions. It is not reasonable to expect that a homeowner be required to educate himself as to the procedures and risks involved in activities such as tree removal, furnace maintenance, carpentry, or the like, to be performed at his home by an independent contractor. In essence, we must make a policy determination on whether the public interest is best served by imposing liability in a case such as this on a private homeowner, as opposed to the "expert" he hired to carry out the task at hand. We do not believe that imposing such liability on a private homeowner would be in the public interest.

Justus, 457 N.W.2d at 106.

In view of the foregoing, I respectfully dissent from the majority decision in this case. I am authorized to state that Justice Maynard joins me in this dissenting opinion.